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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 762

TAR ASPHALT TRUCKING CO., INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES OF AMERICA,

Appellees.

On Appeal from United States District Court
for the District of New Jersey

REPLY BRIEF AND APPENDIX FOR APPELLANT

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Jersey City 2, New Jersey.

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On Appeal from United States District Court for the District of New Jersey

(On Motion to Affirm)

REPLY BRIEF FOR APPELLANT

Counter-Statement

In the Commission report of December 18, 1961 the scope of appellant's authority under its two permits is described as "relatively narrow territorial and commodity authority" (J.S. 13a).

From a reference to the authorities in J.S. 15a-16a; it appears that its territory extends from the Canadian border in New York on the north to points in Maryland and Delaware, 100 miles south of Philadelphia, Pa. on the south and from the Susquehanna River in Pennsylvania on the west to the Connecticut River in Connecticut on the East, an area of roughly 110,000 sq. miles.

ARGUMENT

I.

The appellees have not directly responded to the point raised by appellant in its Jurisdictional Statement whether the lower court was correct in holding that the 1957 amendment overruled the Supreme Court's decision in the *Contract Steel Carriers* case (350 U. S. 469) or whether that decision is still the law as far as existing contract carriers are concerned.

In their argument under Point 3 of their brief (p. 7) however, appellees refer to the holding of this Court in *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U. S. 81, 85-87, that the amended definition of contract carrier "changed the result of our decision in the case of *United States* v. *Contract Steel Carriers* (*supra*).

It did change the result as far as new contract carrier applications were concerned. The application in J-T Transport Co. was for new contract carrier authority and this Court's holding in that case resolved that the amended definition did change the result of its decision in *U. S.* v. *Contract Steel Carriers* in the case before it. It did not hold that the 1957 Amendment overruled the decision of the Supreme Court in the *Contract Steel Carriers* case as far as existing contract carriers are concerned.

II

In the argument under Point I of their brief, appellees urge that the court below reviewed the evidence at length and concluded that the findings were adequately supported in the record and that under the rule established in *Radio Corporation of America* v. *United States*, 341 U. S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 490-491 and *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 536, there is no occasion for further review of these factual issues.

If this was a situation were conflicting evidence was introduced or one where conflicting inferences could be drawn from the unconverted evidence admitted, it would be the Commission's proper function to resolve the disputed questions of fact or the conflicting inferences and if there was substantial evidence in the record as a whole to support its findings, they would not be subject to revision by a reviewing court. But such is not the case.

This Court laid down the standard to be applied in all instances of court review of agency decisions in the case of *Universal Camera Corp.* v. *National Labor Relations Board*, *supra*, where it held at page 477:

> "The Wagner Act provided 'The finding of the Board as to the facts, if supported by evidence, shall be conclusive': Act of July 5, 1935, Sec. 10 (e), 49 Stat. 449, 454, 29 U. S. C. Sec. 160 (e). This Court read 'evidence' to mean 'substantial evidence'; Washington, V & M Coach Co. v. Labor Board, 301 U. S. 142 and we said that '(s)ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'. Consolidated Edison Co. v. Labor Board, 305 U. S. 197, 229.

> Accordingly, it must do more than create a suspicion of the existence of the fact to be established. * * * it must be enough to justify if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. Labor Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 300."

In the same case this Court also set forth the limitations that should govern the exercise of its power to review the correctness of the application of the foregoing standards by a reviewing court. That rule has lately been reaffirmed in the case of *Federal Trade Commission* v. *Standard Oil Co.*, 1958, 355 U. S. 396, at 400-401 in these words.

> "Moreover in Universal Camera Corp v. National Labor Relations Board (giving the citations), we decided that substantially of evidence on the record as a whole to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. This Court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly misapplied. We do no more on the issue of insubstantiality than to decide that the Court of Appeals has made a 'fair assessment' of the record."[1]

It is most difficult to urge upon this Court that one's particular case is one of the rare instances referred to in the foregoing rule and to suggest that the reviewing court has "misapprehended" the standard or has misapplied it.

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[1] The Court in a footnote cited *National Labor Relations Board* v. *Pittsburg S.S. Co.*, 340 U. S. 498, 502-503 (1951); *National Labor Relations Board* v. *American Natl. Insurance Co.*, 343 U. S. 395, 409-410 (1952).

But this must be urged here. It must be urged that the District Court, in reviewing the record and finding that there was substantial evidence on the whole record to support the findings and conclusions of the Commission misapprehended the standard to be applied, as laid down by this Court in *Universal Camera Corp.* v. *National Labor Relations Board, supra*, and that the District Court made such finding without any basis in the evidence for it and that it did not make a "fair assessment" of the evidence in the record.

The Commission found, and the District Court found that there was substantial evidence in the record to support it, that appellant's operations were not those of a contract carrier within the amended definition of the Act on the effective date of the amendment and in the three years following, in that appellant does not assign vehicles for a continuing period of time to the exclusive use of each person served and that the evidence failed to establish that it furnishes a transporation service designed to meet the distinct need of each individual customer.

The Commission further found, and the District Court found that there was substantial evidence in the record to support it, that appellant's operations were those of a common carrier in that the evidence was convincing that appellant holds itself out to any and all shippers who desire service within the scope of its relatively narrow territorial and commodity authority, and under the circumstance respondents contracts with 19 individual shippers cannot be regarded as contracts with a "limited number of persons" within the meaning of section 203 (a) (15) of the act but must be regarded as a holding out of service to the general public within the meaning of section 203 (a) (14) (defining common carriers).

(a)

As set forth in the Jurisdictional Statement (pp. 12, 13a) the Commission did find from the evidence that appellant did set aside two tank trailers for the exclusive use of two shippers but because it further found that the setting aside of the equipment was for the convenience of appellant and not of the shippers it ignored this evidence and notwithstanding it, made the finding that appellant did not assign vehicles for a continuing period of time to the exclusive use of each person served. The District Court adopted the Commission's version and likewise found that appellant did not assign vehicles for a continuing period of time for the exclusive use of each person served (J.S. 6a). This finding is contrary to the evidence in the record.

(b)

As set forth in the Jurisdictional Statement, page 13, under heading "b", the evidence in the record shows that in 1932, before the effective date of the Motor Carriers Act, in 1937, appellant acting under individual contracts, fashioned a tailor-made service to meet the needs of shippers in the area who had need to have asphalt products delivered to them throughout the year in liquid form, including the winter months by installing a heating unit under tanks mounted on a truck. There can be little doubt at the time appellant built this equipment and commenced to render this service to the shippers who had need of it, it was furnishing a specialized service to meet the distinct need of each individual shipper and this service which was specialized and tailor-made at its inception was the service which the evidence in the record shows appellant continued to furnish to meet the distinct need of its individual shippers right down to the hearing before the Examiner on December 1, 1960. It was specialized when it was inaugurated. It did not cease to be with the passage of time.

And so with the remainder of the evidence in the record, referred to in J.S. p. 13, of the development of insulated tank trucks to meet the distinct need of several of appellant's shippers to have temperature of product maintained throughout transit; the installation of pumps in certain of the equipment to meet the distinct need of several of appellant's shippers to have high density material delivered to them for use in their businesses; the application of auxiliary portable burners to meet the distinct need of one of appellant's shippers to have a constant high temperature of product maintained during transportation; the furnishing of barrelling and weighing of product on delivery to meet the distinct need of one shipper for this service; the furnishing of a long hose and pump service to effect delivery to a shipper of his product whose receptacles were a substantial distance from the highway and who had a distinct need for this service; making pick-ups of cargo at refinery at a specified time and delivery at plant at a specified time to meet the distinct need of one shipper for this specialized service; the delivery to daily progressing job sites during course of road construction to meet the distinct need of three of appellant's road constructor customers for this specialized service; and in addition, drivers experienced in the inherent qualities and characteristics of the different type of products transported for each of the customers served.

The development of insulated tanks, the installation of pumps, the application of auxiliary portable burners to maintain high temperatures were specialized and tailor-made services at their inception. The evidence in the record shows appellant continued to furnish them down to the date of the hearing on December 1, 1960. They were specialized when inaugurated; they did not cease to be with the passage of time. Besides these, the evidence referred to above discloses seven separate additional types of spe-

cialized service to meet distinct needs of different customers of appellant, making ten in all, in addition to furnishing delivery throughout the year of asphaltic products in liquid form and the employment of drivers experienced in the different products. The appellant had but 19 effective contracts in all (183a) of which two were serviced by the assignment of vehicles for a continuing period of time to their exclusive use, leaving 17 remaining. One contract was made in 1937 and five in 1941 and are still being served. The specialified service that these shippers were receiving to meet their distinct needs at the time the contracts were entered into has not ceased to be so by the passage of time. To find, as the Commission did that the appellant did not furnish a service to meet the distinct need of each individual customer, requires the above evidence to be ignored or the "needs of the shippers to be held as not "distinct".

As was held by the District Court in *I. T. Transport Co. v. U. S.*, 185 F. Supp. 838, and affirmed by this Court in 368 U. S. 81, "Under the statute a shipper is entitled to have his distinct needs met."

(c)

As to the Commission's holding that the appellant's operations were those of a common carrier in that the evidence was convincing that appellant holds itself out to any and all shippers who desire service within the scope of its relatively narrow territorial and commodity authority, appellant has included herein as Appendix I, the whole of the testimony of the appellant's witness on this point.

This, together with the fact found by the Commission that there were 19 effective contracts during the whole of the three critical years (Commission Report, Dec. 18, 1961, J.S. 11a) furnishes no support in the record for the finding that appellant's operations were those of a common carrier through holding out.

III

In its argument under Point 3 of its brief, the government urges that the prohibition contained in Section 209 (b) (against limiting the number of contracts that an *existing* contract carrier may have) is expressly inapplicable if the Commission finds that the scope of the carriers additional operations is not confined to those of a contract carrier under the amended definition.

This argument is without any force here, because the Commission could not and did not find that there were any additional operations or additional contracts.

Where there are no additional operations the Commission cannot limit the number of contracts an *existing* contract carrier may have because Congress itself has denied this power to the Commission by the proviso in Sec. 209 (b) of the Act (J.S. 21a-22a).

It follows that since the Commission cannot limit the number of contracts an existing contract carrier can have where he has not added contracts, the Commission cannot legally consider the "number" of contracts an existing contract carrier had on the effective date of the amendment (Aug. 22, 1957) as part of its determination whether the *existing* contract carrier has contracts with a "limited number of persons".

If the Commission possessed this claimed power it could render nugatory Congress' own prohibition in the proviso of Sec. 209(b), against limitation of contracts of *existing* contract carriers who have not added any contracts. The Commission is still left free to consider the scope of a contract carrier's *additional operations*, if contracts *are* added, and likewise free to consider if the additional contracts, plus the contracts existing on the effective date of the amendment, are contracts with a "limited number of persons" within the meaning of Sec. 203-(a) (15) of the Act.

It does not have this power where no contracts are added by an *existing* contract carrier to the number of contracts held on the effective date of the amendment.

IV

(a)

The government in its argument under Point 4 of its brief urges that all common carriers do not have the right to "tack" and cites six cases as examples where "no-tacking restrictions were imposed in common carrier certificates under footnote "6" at page 8 of its brief.

It is true that in applications for additional common carrier authority under Section 207, where there must be a showing of public convenience and necessity for the service to be authorized, "no-tacking" restrictions are sometimes imposed in the new authority granted to the common carrier, but in the limited situations where there has been either no showing of need for the proposed service to other areas and the grant, without the restriction would authorize services through tacking to other areas without a showing of public convenience and necessity for them; or alternatively at times to protect existing common carriers from competition where no competition is shown to be required by the public convenience and necessity.

It was where a new grant of operating authority was made under Sec. 207 that a limitation on its use by a no-tacking restriction was imposed in the cases cited in the appellee's brief. By virtue of Sec. 208 the Commission is authorized to do this in Sec. 207 cases.

A reference to the six cases makes this clear.

In *Transport Co. of Virginia Extension*, 43 M. C. C. 716, tacking was allowed the carrier though cited as an example where a "no-tacking" restriction was imposed.

In *Zerbel, Investigation of Operations*, 53 M. C. C. 684, tacking of operations authorized in two separate paragraphs of the one certificate was denied. Tacking of authorities appearing in two separate certificates held by the carrier was allowed. In *Delaher Bros. Storage Co., Extension, California*, 68 M. C. C. 51, tacking was denied to protect existing protesting common carriers.

In *Direct Transport Co. of Kentucky, Inc., Extension*, 68 M. C. C. 151 the Commission imposed a restriction against joinder in the grant because there had been no showing of the need for transportation service apart from Doe Run, Indiana and Louisville, Kentucky.

In *John L. Muth Extension, Kentucky to Eastern States*, 69 M. C. C. 187, a restraint against tacking was imposed because the carrier failed to establish a need for any service between states he was then serving under previous authorities and the states he would be permitted to serve under the additional authority applied for.

In *Coastal Tank Lines, Inc., Extension—Delaware City*, 73 M. C. C. 189, a restriction was imposed against tacking in the certificates of three different applicants because the Commission held that to permit the carriers to join their existing authority with that being granted, would in effect authorize the carriers to perform completely new service.

Even though restrictions against tacking have been imposed in some of the cases cited (new grants of authority under Sec. 207 applications) the long standing policy of the Commission has been to generally permit tacking of common carrier authorities unless there is some valid reason for restricting it. As late as August 22, 1962, the Commission in *Colonial Refrigerated Transportation, Inc., Extension—Frozen Cooked Vegetables* No. M. C. C. 115841 (Sub No. 86) expressed its position as follows:

"It is not our policy to impose no-tacking restrictions on grants of common carrier authority in the absence of some compelling reasons therefor. No such showing has been made here, and, accordingly, we conclude that no restrictions will be imposed on our grant of authority hereinafter set forth."

By the above standard a no-tacking restriction, in the absence of compelling reasons is not ordinarily consistent with common carrier status. The imposition of no-tacking restrictions in all converted common carrier certificates would thus discriminate against the converted common carrier and in favor of the regular common carrier.

(b)

The government argues in its brief under Point 5 in support of the motion to affirm, that the Commission's prohibition on tacking is justified by its statutory authority to limit the carrier to the same points and territories authorized by the permit.

It is grounded on the premise that there is statutory authority for its action when in fact there is a complete absence of statutory authority for such action. The statutory reference employed by the Commission is that appearing in Sec. 212 (c):

"Such certificate so issued shall authorize the transportation as a common carrier of the same commodities between the same points or within the same territory as authorized in the permit."

Everything the Commission says in the case of *T. T. Brooks Trucking Co., Conversion Application* 81 M. C. C. 561 is appropriate to the status of the carrier as a contract carrier. Nothing it says has any application to the status of the converted carrier as a common carrier.

The statute itself (212(c)) does not say there shall be no tacking of separate grants of authority and the only support for the Commission's unanimous restriction against tacking in all contract carrier conversion proceedings must be found in the Commission's interpretation of its duty under the last sentence of 212(c) quoted above.

But does a reading of this sentence require or even justify a conclusion that there shall be no tacking in the converted common carrier's certificate.

The legislative history of the Act is referred to in *J. B. Montgomery, Inc.* v. *United States*, 266 F. Supp. 455:

> "This enlargement in the scope of operations of converted carriers was recognized in the legislative history which we have previously quoted. Mr. Clarke, the chairman of the Interstate Commerce Commission, stated that the conversion from a permit to a certificate not only didn't take away anything from the carrier, but gave him a greater opportunity. 'He can still serve his contract shippers, but through the conversion provisions of the bill he would also have the opportunity to serve the general public as well as the obligation.'"

(c)

To reach its conclusion that there shall be no tacking allowed to the converted common carrier the Commission is forced to introduce its own interpretation that Congress intended by the words used; a substantial parity between the operations of the carrier as a contract carrier and the operations to be performed by the carrier as a common carrier.

The only way that the Commission can logically adopt this concept in a conversion proceeding is to presuppose

or presume that Congress did not know that tacking was denied to contract carriers but tacking was generally allow to contract carriers. This presumption is unwarranted.

As was said in *J. B. Montgomery, Inc. v. United States*, 206 F. Supp. 455 (now pending before the court on Jurisdictional Statement, No. 791 this term):

> "There is nothing in the Act or its legislative history indicating that Congress intended to restrict this enlargement of operations by the test of 'substantial parity' or otherwise.
>
> "Any adverse effect upon the industry resulting from the lack of authority of the Commission to impose restrictions to accomplish 'substantial parity' between past and future operations is a matter for consideration by the Congress and is not a justification for this court to write into the congressional legislation something which is neither evident from the language of the Act nor from the legislative history."

CONCLUSION

The questions presented are substantial and justify plenary consideration for their resolution.

Respectfully submitted,

JOHN J. CORCORAN, JR.,
Counsel for Appellant.

APPENDIX I

Excerpts from Hearing before the Interstate Commerce Commission

U. S. Custom House Building,
Second and Chestnut Streets,
Philadelphia, Pennsylvania,
Thursday, December 1, 1960.

Met for reopened hearing, pursuant to notice, at 9:30 a.m.

Before:

SAMUEL C. SHOUP, Examiner.

Appearances:

JOHN J. CORCORAN, JR., 64 Boyd Avenue, Jersey City, New Jersey, appearing for Tar Asphalt Trucking Company, Inc., Respondent.

ARTHUR S. COPCUTT was sworn and testified as follows:

(commencing at 16-19)

Exam. Shoup: Mr. Copcutt, who in your organization procures the additional contracts when that becomes necessary?

The Witness: Mr. Anthony Santaniello, or by his direction.

Exam. Shoup: That is the President of your corporation?

The Witness: That's correct. Or by his direction.

Exam. Shoup: And how does he go about procuring an additional customer?

The Witness: Well, if they call in requesting our (17)* specialized service—let's say it's a manufacturer and he has an amount of transporation of a certain commodity to be taken care of; he calls in and we know some of the key questions to ask him which Mr. Anthony Santaniello has requested if any call is made in to get this information. For instance, the quantity—the estimated quantity for the year or for how many years they anticipate that they might want this service; whether it's constant, by the day, by the month, by the week; whether it's seasonal, and any other important particulars which he can—which he might have need of in order to discuss it.

Then he goes over there and discusses it with them or discusses it by phone and any other means that he has of contacting them, and he gives us the order to type up the contract and then we mail it all over, or he brings it over or he has someone bring it over for signature.

(commencing at 19-13)

Exam. Shoup: Excuse me.

Does your company accept business from any and all persons who desire the transporation of products which you are authorized to transport?

The Witness: Do they—

Exam. Shoup: Provide service for any and all persons who want the transportation of the products which you transport?

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* All figures in parentheses indicate the number of each new page of the stenographic transcript.

Appendix I

The Witness: Well, I turn them over to Anthony J. Santaniello. It is at his disposition whether they are accepted or not. If they meet the terms of the contracts, or if he meets the terms of the contract, or it is agreed between the two parties.

Exam. Shoup: Well, if you had fifty new customers today who wanted to engage your service would your company perform service (20) for an additional 100 shippers?

The Witness: I couldn't answer that, because A. J. is the man that handles that. I just take the message and order and relay it to him and he has to make the disposition on that.

Mr. Corcoran: I might make this suggestion, if it will help clarify the situation.

Whether they would or would not perform the service for any single person who called in would depend solely and wholly on the fact of whether they could come to agreeable terms between them. If they could not, they would not enter into an agreement. If they could, they would.

The Witness: That is what happens.

Mr. Corcoran: There are companies coming in for new business but they are not always able to come to terms because of the specialized nature of the service, the distance that their products may have to be transported within the area permitted by the rights, and because of the varying demands or the intervals that may exist between the demands of the customer for the service that he may want. He may want—let me—this I will put on the record as some sort of an analogy.

He may want transportation from a point in Delaware, or a point in the western part of Pennsylvania to a point almost towards Connecticut; and he may only want that operation on one particular day. That would require the

movement of the equipment to the point where it would be loaded, the movement of it (21) from Jersey City to this particular point, maybe towards the Susquehanna River in Pennsylvania, empty, and then coming back from a point like Middletown, Connecticut, empty. Such an operation would ordinarily be one that wouldn't be very attractive to the company, but if the customer was willing to enter into an arrangement that would take into consideration the truck going back and—going first to be loaded empty a distance of maybe 200 miles and coming back a distance again of maybe 90 miles empty and was willing to allow for that, then they would be willing to do it, but—

The Witness: Compensation—

Mr. Corcoran: But most often there is other kinds of service that would suit the customer better and after their discussion with Mr. Santaniello they wouldn't come to an agreement. And it wouldn't be because we would not want to take it, but because each contract calls for a specialized treatment, a specialized agreement. There is no fixed schedule of rates.

APPENDIX J

TAR ASPHALT TRUCKING CO.

SCHEDULE OF CONTRACTS WITH SHIPPERS FOR WHOM INTERSTATE CONTRACT CARRIER SERVICE HAS BEEN PERFORMED WITHIN THE LAST THREE YEARS.

American Bitumuls & Asphalt Company—Entered into April 3, 1952.

The Barrett Division, Allied Chemical & Dye Corporation—Entered into June 11, 1945 and as amended Dec. 5, 1945, Dec. 1, 1947, Jan. 22, 1948.

Cities Service Oil Co.—Entered into Mar. 12, 1941.

The Flinkote Company—Entered into Sept. 30, 1948.

Koppers Co.—Entered into June 22, 1937; Feb. 1, 1948 Add 1-14.

William V. Mack Company—Entered into Jan. 1, 1952.

W. L. Mason Company—Entered into Oct. 29, 1947.

Raybestos Division—Entered into Jan. 21, 1953.

Socony-Vacuum (Standard Oil of N. Y.)—Entered into June 30, 1951.

Standard Bithulitic Co.—Entered into April 4, 1941.

Standard Oil Co. (N. J.)—Entered into Nov. 1, 1950.

Sun Chemical (A. C. Horn)—Entered into—not dated—Add. Mar. 26, 1956 and Jan. 1, 1957.

The Texas Company—Entered into Mar. 25, 1941.

The Barber Company—Entered into Mar. 17, 1941.

Appendix J

Brookhaven Asphalt Co.—Entered into Jan. 1, 1952, Add 1-1-57, Add. 3-1-58.

Metropolitan Roofing & Supply Co.—Entered into Mar. 21, 1941.

National Waterproofing Papers, Inc.—Entered into—not dated, Add. 1-1-51; Add. 1-1-57; Add. 3-1-58.

Ernest Zobel & Co.—Entered into Jan. 1, 1952.

Del-Val Asphalt Corp.—Entered into, contract undated.